In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
ARTHUR B. BARRINGER. } No. 252.

REPLY BRIEF FOR THE UNITED STATES.

VARIANCE BETWEEN DECISION OF THE COURT OF CLAIMS AND ARGUMENT OF COUNSEL FOR APPELLEE.

The claim in this case is rested primarily upon the second proviso of the act of June 11, 1896. This proviso the Court of Claims interpreted as conferring upon employees of the Government Printing Office, serving fractional parts of a year, the right to pay with their proportionate, or *pro rata*, leaves of absence, which right to pay in such cases, according to the court, did not exist prior to that enactment. But the argument of counsel for claimant on this appeal is at variance with this view of the court, their contention being that the right to pay with *pro rata* leave existed by virtue of the prior legislation. This is a matter of vital signification. As interpreted by the court, the words "pay for *pro rata* leave," found in the above cited proviso, supply an omission of the prior statutes of 1888 and January 12,

1895, in which no provision is made for pay, the language being simply "*Provided*, That it shall be lawful to allow pro rata leave to those serving fractional parts of a year."

Hence this proviso, as thus interpreted by the court, affords, in terms, no authority for a commutation of unused leave, and accordingly the court was obliged to rest its decision in that regard upon the hardship of denying *pro rata* leave to one serving a fractional part of a year and upon what seemed to the court the plain justice of allowing him commutation for the leave thus denied. But this is a reason not found in statutory authority, but beyond it. On the other hand, according to the contention of counsel for the claimant, the proviso in question provides for an alternative in case *pro rata* leave with pay is not allowed, that alternative being pay for unused leave. In other words, it comes to this: That the words "pay for *pro rata* leave" mean commutation of pay for unused leave, and nothing else. It seems to us that this interpretation is absolutely strained and unwarranted, whilst the interpretation given to the phrase by the court is perfectly natural and in accordance with the plain meaning of the words employed.

QUESTION OF PRECEDENT.

Counsel for claimant contend that the decision in this case furnishes no broad precedent, but relates simply to the rights of a limited class of employees in the Government Printing Office. This contention is contradicted by the interpretation which the court

gives to the second proviso of the act of 1896, above discussed. That decision, in effect, simply places those serving a fractional part of a year upon an equal footing with those regularly employed by the year, and the decision does not give to those serving a fractional part of a year the right to commutation for unused leave by reason of any peculiar or special meaning of the proviso under consideration. Accordingly, if the decision is authority for the claim of the claimant, it is equally valid authority for the payment to regular employees of the Government Printing Office for any unused portion of their annual leave, and by the same token is like authority for the commutation of unused leave to employees in every other department of the Government.

DISCRIMINATION.

Taking the counsel for claimant on their own ground, they ask that a discrimination be made in favor of a single class of employees in one of the Executive Departments; for they do not contend that there is provision for, and it is obvious that there is no statutory warrant whatever in any of the acts relating to leaves of absence of employees of the Public Printing Office for, commutation of unused annual leave of regular employees. It certainly is most extraordinary to suppose that Congress intended any such discrimination. The argument of counsel in support of this contention is that the temporary employee has no opportunity to demand his vacation during his temporary employment, and that in most cases it would be inexpedient to allow it to him during such employment.

Granting this to be so, there is no reason why the leave of such employee should not be granted to him at the end of his employment, according to the method recited in the Comptroller's decision quoted in brief for appellee.

WAIVER AND MANDAMUS.

The claimant neglected to pursue what would seem to be his obvious course, namely, to demand that his leave of absence be granted to him at the conclusion of his temporary employment, and this continued neglect on his part to thus assert his rights for a period of five successive years, meanwhile accepting without protest his pay for the time for which he was employed, would seem to amount to a distinct waiver on his part. This right to leave of absence if thus asserted by him and denied could unquestionably have been enforced by mandamus and without any attending embarrassment or hardship such as has been suggested by counsel for claimant. Indeed it would seem that nothing could have been easier than for the several hundreds of claimants interested (Transcript of record, p. 4) to have made a test case through one of their number in this way.

APPROPRIATION ACT OF 1897.

Counsel for claimant find in the act of July 19, 1897, by which payment was made to various employees of the Government Printing Office for unused leave, not only a recognition of the justice of claims of that character but of an absolute indebtedness therefor. This act was passed pursuant to the resolution of the Senate

of June 10, 1896, which called for a list of employees in the Government Printing Office of those who had failed to receive their annual leave of absence during the fiscal years 1890, 1891, 1892, 1893, and 1894, and the amount due each person for each fiscal year, separately, on account of such failure. In response to this resolution the Public Printer furnished not only the information called for but also like information for the fiscal years 1887, 1888, and 1889, and still further a list of temporary employees who had never received any *pro rata* leaves of absence with pay.

It will be seen that in the legislation upon the subject of leaves of absence for employees in the Public Printing Office during and prior to the period embraced in this resolution there had not been any attempt, even according to the contention of counsel for claimant, to provide for commutation of unused annual leaves of absence nor for unused *pro rata* leave; accordingly there could have been nothing "due" by virtue of statute to any employees of the Government Printing Office during that period. It certainly could have been due in no other way, and hence the phrase "amount due" must be taken to mean the amount of pay which they would have received if leaves of absence had been granted.

Accordingly, this appropriation act can properly be construed as nothing more than an act of grace on the part of Congress. Certainly the views of the cashier of the Government Printing Office, volunteered by him upon the subject in making out the list called for

by the Senate resolution, are not weighty matters in this connection.

POLICY OF STATUTES GRANTING LEAVE OF ABSENCE.

The policy of granting leaves of absence to Government employees is very clearly and ably set forth by Chief Justice Nott, of the Court of Claims, in the Harrison case. He especially emphasizes the fact that this policy is *not* to increase pay, but if the contention of counsel for claimant be sustained that is precisely what would result. No good reason has been offered why Congress should in 1896 desire to change the policy of all its previous enactments on the subject of leaves of absence. There seems also to be no good reason why this policy could not be carried out by granting *pro rata* leave to temporary employees at the close of such temporary employment. It is clear from the history of the service of claimant that in a sense his employment was regular, in that he was employed every year for five successive years. It is inconceivable that a skilled workman like the claimant would give up regular employment elsewhere for a temporary employment in the Government Printing Office, amounting in one year only to twenty-nine days, and accordingly it is reasonable to suppose that he was enabled to arrange to leave regular employment elsewhere in order to accept this temporary employment by the Government, and that so he was not forced after leaving the Government service each year to wander about searching for work. If, then, his vacation had been granted him at the end of his term of service,

there is no reason to suppose that he would not have taken the benefit of it and thus, since he was employed for several successive years, the policy relating to leaves of absence would have been carried out in his case. But the claimant in this case failed to make any demand for this leave of absence to which he was clearly entitled and which, according to the policy above referred to, he should have received, and the Public Printer, on his part, neglected to carry out the policy of Congress by granting the leave. But here counsel contend that there was no neglect of duty on the part of the Public Printer, but that on the other hand express provision has been made for leave not granted by him in the way of commutation. Such contention amounts to this: That at the will of the Public Printer the policy upon which leaves of absence are allowed, and should, in fact, be without exception given where provided for, may be wholly thwarted, and in lieu thereof the claimant be entitled to increased pay without any of the corresponding benefit to the Government which comes through the enjoyment of the vacation by the employee. It is plain, too, that this evasion of the purpose of Congress would in many instances be encouraged by employees who prefer double pay to a vacation with pay.

ACCUMULATION OF LEAVE.

The first portion of the act of June 11, 1896, relates to all classes of employees in the Government Printing Office, and expressly provides that leaves of absence

shall not be allowed to accumulate from year to year. We have urged this statute against the claim in this case in our prior brief. Counsel for claimant say that this prohibition does not apply to claimant's case, because he did not serve for a full year at any time, but he certainly served for five successive years, and he certainly allowed his leaves of absence to accumulate from year to year of that period. But counsel urge that, granting this, it was the fault of the Public Printer. It certainly was equally the fault of the claimant.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. M. ANDERSON,
Special Attorney.

O